Supreme Court of the United States

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER.

PETITION FOR REHEARING

MORISON R. WAITE,
HARRY H. BYRER,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

WAITE, SCHINDEL & BAYLESS,
Cincinnati, Ohio,
Attorneys for Petitioner.

THE JOHNSON & HARMON CO., LAW PRINTERS
CINCINNATI, OHIO

Supreme Court of the United States

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER.

PETITION FOR REHEARING

Now comes the above-named Petitioner, The Baltimore and Ohio Railroad Company, and respectfully presents this, its petition for rehearing of the above-entitled cause, so that the questions involved herein may be finally decided by a majority of the court for the benefit of all litigants in causes similar to the case at bar. Both railroad employes and railroad employers would be benefited by such a decision of this court, which will prevent continuing litigation seeking the benefit of the opinion of a majority of the justices of this court.

The petitioner prays not only for a rehearing but that such rehearing may be deferred until the court is constituted with nine members.

The petitioner respectfully shows that the Supreme Court of Ohio in its decision below, 137 O. S. 409 (R., p. 23), decided that the equities favored the petitioner; that the prosecution in the District Court of the United States for the Eastern District of New York would cause great inconvenience and unnecessary expense to the railroad company, and that the Ohio courts were only prevented from following the rule declared in *New York, Chicago & St. Louis Ry. Co.* v. *Matzinger*, 136 O. S. 271, and enjoining the respondent from the prosecution of his action in an inequitable manner, by the supposed terms of section 6 of the Federal Employers' Liability Act, as amended in 1910.

It is again urged that an affirmance of the judgment of the Supreme Court of Ohio gives a construction to the act of Congress which is beyond anything expressed in the language of said act, and contrary to the manifest intention of Congress in its enactment, as shown by its history, to minimize the expense of litigation under said Federal Employers' Liability Act. This court has held that notwithstanding the broad provisions of said section 6 of the Federal Employers' Liability Act, the courts should prevent the abuse of the choice of venue afforded by the act, when such choice results in a burden upon interstate commerce. *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492. The power of State courts to enjoin an inequitable prosecution by a resident of that state in a foreign jurisdiction has long been recognized even against a right asserted under the Constitution of the United States to resort to such foreign jurisdiction. *Cole* v. *Cunningham*, 133 U. S. 107. Section 6 of the Federal Employers' Liability Act, as amended in 1910, did not either expressly or by implication, curtail the power of courts of equity to prevent an inequi-

table choice of venue. The manifest purpose of Congress as shown by the report of the Interstate Commerce Committee of the Senate in submitting the amendment to Congress, was to prevent the necessity of plaintiffs bringing actions under the act at the domicile of the defendant railroad company many miles distant from the residence of the plaintiff and the scene of the accident. It can not be presumed that in freeing the plaintiffs from such hardship, Congress gave to plaintiffs the right to impose greater hardship on the defendants, free from the restraint customarily exercised by courts of equity to prevent the prosecution of inequitable and harrassing actions.

Congress must have realized that the broad venue provisions of the act contended for on behalf of respondent, might result in inequitable use of such provisions, and designedly so worded the act as to leave the courts unfettered to prevent by injunction such inequitable actions. The inherent right of Ohio to prevent its citizens from inequitable conduct, not being expressly denied by the act, it must be strictly construed against the denial of such right by implication. *Reid* v. *Colorado*, 187 U. S. 137, 148; *Kelly* v. *Washington*, 302 U. S. 1.

The considerations which moved this court to prevent the prosecution of cases against interstate carriers in distant jurisdictions where neither party was domiciled, remote from the place where the cause of action arose, in *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312, and *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492, are much greater now than then, when the whole country is involved in a tremendous defense program, the success of which is largely dependent upon the ability of the interstate carriers to transport not only goods and persons in normal conduct of business, but also the greatly increased amount of goods and passengers due to the defense program. It is difficult to conceive of a case involving a burden on interstate com-

merce greater than that resulting in this case, where a number of railroad employes would be required to be transported and held probably many days before the call of the case for trial, in a jurisdiction the farthest distant that could be found from the residence of the respondent and the scene of the accident on petitioner's line of railroad. The utter futility of this burden and harassment is settled by the Record in the allegation in the petition, admitted by the demurrer, "that such unreasonable and inequitable proceeding will result in no benefit to the defendant, Frederick S. Kepner" (R., p. 4, paragraph No. 12 of the petition below).

This litigation has proceeded without delay on the part of this petitioner; each appeal has been perfected forthwith. The only delay was not due to petitioner but incident to a three to three decision of the Supreme Court of Ohio, which court granted a rehearing after the seventh judge had been appointed, which hearing was held the first day of the term following the summer vacation of the court.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that such rehearing be had after the court is constituted with nine members, and that the judgment of the Supreme Court of Ohio be, upon further consideration, reversed.

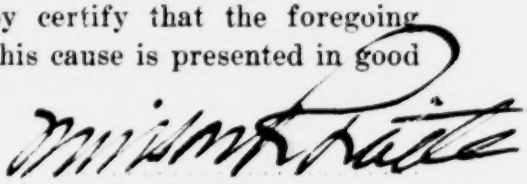
Respectfully submitted,

Morison R. Waite,
Harry H. Byrer,
William A. Eggers,
Philip J. Schneider,
Counsel for Petitioner.

Waite, Schindel & Bayless,
Cincinnati, Ohio,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

I, Morison R. Waite, one of the Counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.



MORISON R. WAITE,
Counsel for Petitioner.